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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 75

CAROLINA PIPELINE COMPANY, *Petitioner*,
versus
YORK COUNTY NATURAL GAS AUTHORITY,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CAROLINA PIPELINE COMPANY, *Petitioner*

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YORK COUNTY NATURAL GAS AUTHORITY, *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The York County Natural Gas Authority respectfully requests that the Court refrain from issuing a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on December 29, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina is reported in 266 F. Supp. 244, and the opinion of the Court of Appeals is reported in 388 F.2d 297.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the Court of Appeals for the Fourth Circuit correct in holding that the District Court, having jurisdiction to determine whether the petitioner had the right to serve consumers in York County, had the power to stay an action in the state court to adjudicate the identical question.

2. Was the Court of Appeals for the Fourth Circuit correct in holding that there was no abuse of discretion on the part of the District Court in declining to abstain from an adjudication of the merits under the circumstances presented.

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. 2283, 11 U.S.C. 11(15), and 11 U.S.C. 401, 402, and 403.

STATEMENT

The York County Natural Gas Authority (the Authority) was created by the South Carolina Legislature in 1954. From the outset it was managed by Carolina Pipe Line Company (Carolina) who was also and still is the sole supplier of all natural gas sold to the Authority.[1] In 1957, as a precondition to the issuance of the original bonds for funds to construct and operate the Authority's systems, Carolina agreed that it could not serve customers directly in York County except with the Authority's approval. This assured the Authority protection against the untenable

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[1] Identical Authorities, with the same arrangements with Carolina, were set up in the counties of Chester and Lancaster, South Carolina.

situation of competing for customers with its own manager-supplier.

In May, 1961 the management contract with Carolina was terminated and in September 1961 the Authority defaulted in payments on its bonds, with the resulting composition proceedings in federal bankruptcy court over these bonds. Carolina's principal officers, directors and shareholders testified in the several hearings in opposition to the Plan of Composition subsequently adopted by the court and in favor of a plan to lease the facilities of the Authority to Carolina for 40 years.

All witnesses agreed that the success or failure of the court approved plan depended upon the accuracy of the projections as to future gas consumption, which themselves were based upon the premise that all customers in the county belonged to the Authority. Carolina's president testified that it was not competitive with the Authority at that time, without suggestion that the present issues would thereafter be raised in a further effort to defeat the approved Plan of Composition.

The District Court plan, as modified, was approved by the Court of Appeals and this Court denied *certiorari* in April 1966. *Mozingo v. York County Natural Gas Authority*, 352 F.2d 78 (4th Cir. 1965) cert. denied 383 U.S. 970. In December 1966 Carolina commenced an action in the state court for a declaratory judgment to the effect that it had the right to serve industrial customers in York county without the approval of the Authority.[2]

In January 1967 the Authority filed a supplemental petition in the bankruptcy court requesting that it stay further state court proceedings and itself determine the rights of the parties, contending that Carolina was barred by contract, estoppel, laches and its enabling act from serving customers in York county and that Carolina was

[2] Of course, if Carolina has the right to serve industrial customers, it follows that it also has the right to serve all customers in York county, including retail.

jeopardizing the plan, which had not been at that time completed. Based upon the petition the District Court issued a rule to show cause. Carolina filed a motion to dismiss, asserting (1) that the Federal Court was without jurisdiction over the subject matter and (2) it had no authority to issue a stay. The Court overruled the motion, found jurisdiction present, and issued the stay. Pet., 14. The Court of Appeals considered and affirmed that part of the order involving only the narrower issue of the propriety of issuing the stay. Pet. p.21.

Reasons for Denying the Writ

I.

A review of the pertinent circumstances plainly indicates that the decision below places the merits of this action in the most appropriate forum in complete compliance with established principles governing the relationship of the State and Federal judiciary and the principles of the administration of bankrupt estates.

A. The District Court had jurisdiction to hear the merits of the Controversy.[3] All of the assets of the Authority, including its claim to an exclusive territorial franchise as against Carolina, were in the bankruptcy court. *Calloway v. Benton*, 336 U.S. 132; *Poinsett Lumber & Manufacturing Co. v. Drainage District No. 7*, 119 F.2d 270 (8th Cir. 1941).

B. The Plan of Composition has still not yet been completed and Congress has directed bankruptcy courts to exercise their powers until full completion is attained. 11 U.S.C. 403(j); *Wertz v. Village of Solon, Ohio*, 148 F.2d 63 (6th Cir. 1945).[4]

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[3] This holding of the District Court was not appealable and thus is not now before the Court. 11 U.S.C. 47(a); *Hillcrest Lumber Co. v. Terminal Factors, Inc.*, 281 F.2d 323 (2d Cir. 1960).

[4] In paragraphs (b) and (f) of the Order of September 27, 1967 the District Court specifically made provision for bonds not yet deposited and the disposition of the merits of this action, both matters of unfinished business. Pet. 24-25.

C. The claim of the Authority to an exclusive franchise as against Carolina, is its "property", and, upon any challenge thereof in the state court, Congress has authorized a court of bankruptcy to protect such right as a part of the assets of the bankrupt estate. 11 U.S.C. 11(15); *In Re Hermitage Building Corp.* 100 F.2d 597 (7th Cir. 1938).

D. By asserting a claim to the territory of the Authority, Carolina clearly became a "creditor" within the bankruptcy composition statute under which Congress has specifically authorized the District Court to require assertion of all claims in the federal court. 11 U.S.C. 403(c); *Poinsett Lumber & Manufacturing Co. v. Drainage District No. 7*, 119 F.2d 270 (8th Cir. 1941).

E. Inherent in the Plan of Composition adopted by the District Court was the essential premise, actively encouraged by the principal officers, directors and shareholders of Carolina, that the Authority's territory was exclusive, as against Carolina, to *all* customers, present and future. Thus the action of the lower court is basic to the duty of all federal courts, as commanded by Congress, to "effectuate and protect" their judgments. 28 U.S.C. 2283.

F. The State of South Carolina, acting through the Authority as its instrumentality, has by this action *requested* the District Court to resolve this controversy.[5] The General Assembly of South Carolina has both generally and specifically approved this forum for resolution of the ills of the Authority. Sect. 1-71 of the 1962 Code of Laws of South Carolina; 1964 S.C. Stat. p. 3380; Appendix p. 11.

G. No far-reaching questions of state law are involved. The merits of the controversy involve the rights of the Authority to its territory *as against Carolina*, and no one else. The majority of the grounds pled by the Authority in both jurisdictions involve simple issues of contract, estoppel and laches. The intent of the South Carolina General Assembly in creating the Authority as determined by con-

[5] Similar companion Authorities, with the same potential problem, join in this request as *amicus*.

struction of its 1954 enabling Act will only be reached if these questions are resolved against the Authority.[6] In view of the impact which determination of these issues on the merits will have upon the feasibility of the Plan of Composition and upon the bondholders and gas consumers in York county, the state court, should, in compliance with established principles of South Carolina law, abstain in favor of the federal forum. The South Carolina Supreme Court has adopted the rule enunciated by this court in *Kansas City-Southern Railroad Company v. United States*, 282 U.S. 760:

> 'The existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the court.' *Sparrow v. Nerzig*, 228 S.C. 277, 286, 89 S.E.2d 718 (1955).

Certainly the South Carolina courts would find no offense in the decision in the lower court.

H. From its birth until its bankruptcy, and then during the rebuilding of its structure in the District Court, the Authority was in fact involved with Carolina and its principal officers and directors as such. Only after it had exhausted all other legal avenues in the Composition Proceeding to thwart the independent survival of the Authority did Carolina seek to formally assert in state court its present claim to the Authority's territory and customers and thus to its lifeblood.[7] This claim, now first asserted is rested upon the 1954 language of the enabling Act creating the Authority which considerably antedates commencement of the Composition Proceedings. Under such circumstances the equity powers of a federal bankruptcy court are parti-

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[6] Any bankruptcy court must resolve questions of state law, such as creditors' rights, lien preferences, fraud, etc. This is a duty imposed by the original Constitution of the United States.

[7] These efforts included the request, through a bondholder, for this Court to grant *certiorari* to review an alternate plan under which the Authority would be turned over to Carolina. *Mozingo v. York County Natural Gas Authority*, 383 U.S. 970.

cularly applicable. *American United Mutual Life Insurance Co. v. City of Avon Park*, 311 U.S. 138, 145 (1940).

I. The South Carolina Public Service Commission is not a party to this action and its jurisdiction over Carolina remains unaffected. Evidence on the merits will indicate that the Commission's original grant to Carolina of permission to do business contemplated that Carolina would not serve customers in York county.

II

The decision below complies fully with prior decisions of this Court. In *Calloway v. Benton*, 336 U.S. 132 (1949), this Court was careful to point out that the property which was the subject of the state court suit did not belong to the bankrupt, noting that "any controversy involving that estate would have been within the exclusive jurisdiction of the bankruptcy court". p.142. The subject of this action is the exclusive nature of the Authority's territorial rights as against Carolina, plainly "property of the bankrupt", in existence at the inception of the Composition Proceeding.

In *Texas v. Donoghue*, 302 U.S. 284 (1937) the state court proceeding involved the right of the sovereign State to litigate in its courts its title to oil which had been forfeited to the State long before the bankruptcy proceeding was commenced. Here the State itself seeks to invoke the jurisdiction of the bankruptcy court. Compare *Leco Properties, Inc. v. R. E. Crummer & Co.*, 128 F.2d 110 (5th Cir. 1942).

III

The decision below and that of the Court of Appeals of the Second Circuit in *In Re Ambassador Hotel Corporation*, 124 F.2d 435 (2nd Cir. 1942) are completely consistent. That decision involved neither the bankrupt nor its assets, but rather the subject of the state court action was the right of a stockholder of the bankrupt to receive his stock from a voting trust under a state statute enacted subse-

quent to the installation and completion of the plan of reorganization. The claim which Carolina seeks to litigate in the state court here is a claim of the right to serve territory which it says it has *always* had. Pet. p.6, par. (B). This claim existed prior to the bankruptcy and is lost on failure of assertion. Compare *Buell v. City of Montague*, 190 F.2d 1019 (9th Cir. 1951).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX